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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 RALPH A. HUNTZINGER and ERIC  
11 BUSH, on behalf of himself and all  
12 others similarly situated,

13 Plaintiffs,

14 v.

15 AQUA LUNG AMERICA, INC. and  
16 SUUNTO OY,

17 Defendants.

CASE NO. 15cv1146-WQH-AGS

ORDER

HAYES, Judge:

18 The matters before the Court are the Motion to Strike Aqua Lung's Third Party  
19 Complaint (ECF No. 128) and the Motion to Dismiss the Second Amended Class  
20 Action Complaint (ECF No. 129) filed by Suunto Oy.

21 **I. BACKGROUND**

22 On May 21, 2015, Plaintiff Ralph Huntzinger initiated this action by filing a class  
23 action complaint alleging the following causes of action against Defendant Aqua Lung  
24 America, Inc. ("Aqua Lung"): (1) violation of Consumers Legal Remedies Act  
25 ("CLRA"), Civil Code section 1750 *et seq.*; (2) violation of the Unfair Competition  
26 Law ("UCL"), Business and Professions Code section 17200 *et seq.*; and (3) breach of  
27 implied warranty. (ECF No. 1). On December 10, 2015, the Court issued an order  
28 granting in part and denying in part a motion to dismiss filed by Aqua Lung. (ECF No.  
22). The Court dismissed the implied warranty of merchantability claim and denied the  
motion to dismiss in all other respects. *Id.*

1 On January 7, 2016, Huntzinger filed the First Amended Class Action Complaint  
2 (ECF No. 26) alleging the same three causes of action. (ECF No. 26). On January 21,  
3 2016, Aqua Lung filed an Answer to the Amended Complaint. (ECF No. 28).

4 On August 2, 2016, Aqua Lung filed a Third Party Complaint against Suunto Oy  
5 (“Suunto”). (ECF No. 45). On December 6, 2016, Suunto filed an Answer to the Third  
6 Party Complaint. (ECF No. 61).

7 On March 13, 2017, Huntzinger filed a motion for leave to file a Second  
8 Amended Class Action Complaint. (ECF No. 79). On June 1, 2017, the Court granted  
9 leave to file the Second Amended Class Action Complaint (“SAC”). (ECF No. 111).

10 On June 9, 2017, Huntzinger and newly-added plaintiff Eric Bush filed the SAC  
11 alleging the same causes of action for violations of the CLRA, violation of the UCL,  
12 and breach of the implied warranty against Aqua Lung and newly-added defendant  
13 Suunto. (ECF No. 117).

14 On July 5, 2017, Aqua Lung filed an Amended Third Party Complaint against  
15 Suunto. (ECF No. 124).

16 On July 5, 2017, Aqua Lung filed an Answer to the SAC. (ECF No. 123).

17 On July 19, 2017, Suunto filed a motion to strike the Third Party Complaint.  
18 (ECF No. 128). On August 2, 2017, Aqua Lung filed a Notice of Non-opposition.  
19 (ECF No. 131). On August 4, 2017, Suunto filed a reply. (ECF No. 133).

20 On July 19, 2017, Suunto filed a motion to dismiss the SAC. (ECF No. 129).  
21 On August 21, 2017, Plaintiffs filed a response in opposition. (ECF No. 137). On  
22 September 5, 2017, Suunto filed a reply. (ECF No. 138).

## 23 **II. ALLEGATIONS OF THE COMPLAINT**

24 Suunto is a Finnish Company “in the business of designing and manufacturing  
25 adventure sports equipment including the Dive Computers.” (ECF No. 117 at ¶ 14).  
26 Suunto “designed and manufactured the Dive Computers that were distributed by  
27 defendant Aqua Lung.” *Id.* ¶ 14. “Suunto sought out and entered into a distribution  
28 agreement with Aqua Lung for the purpose of marketing and distributing the Dive

1 Computers in the United States for sale to consumers.” *Id.* ¶ 21.

2 Aqua Lung is a Delaware corporation “in the business of distributing and  
3 marketing scuba diving products.” *Id.* ¶ 19. Until December 31, 2015, “Aqua Lung  
4 was the exclusive United States distributor for Suunto-branded dive computers,  
5 including the Dive Computers at issue and was a Suunto authorized repair facility for  
6 the Dive Computers.” *Id.* ¶ 23.

7 “Dive Computers<sup>1</sup> are devices used by underwater divers to measure various  
8 aspects of a dive critical to the safety of the diver.” *Id.* ¶ 26. “Dive Computers are a  
9 critical instrument to assist divers in avoiding decompression sickness. They are used  
10 to track . . . the time and depth limits the diver should stay within to avoid  
11 decompression sickness.” *Id.* ¶ 28. “Dive Computers also display other critical  
12 information such as, water temperature . . . , air tank pressure, and estimated remaining  
13 air time. A misreading of any of this information can also lead to serious injury or  
14 death.” *Id.* ¶ 29. “The only reason to purchase a Dive Computer is to have knowledge  
15 of the critical information regarding a dive. If the Dive Computer cannot reliably  
16 provide that information, it is worthless.” *Id.* ¶ 30.

17 “Defendants advertised the Dive Computers as having the ability to provide  
18 critical information regarding a dive, such as, dive depths, air pressure and remaining  
19 air time.” *Id.* ¶ 31. “The user guides for the Dive Computers, which were created by  
20 Suunto, similarly highlight the Dive Computers’ purpose. For example, in the Cobra  
21 3 user guide, Suunto states: ‘The Cobra 3 simplifies your diving experience because all  
22 the information you need relating to depth, time, tank pressure, decompression status,  
23 and direction is available on one easy-to-read screen.’” *Id.* ¶ 32. Suunto owns a  
24 website which “advertise[s] the Dive Computers to United States consumers” by  
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26 <sup>1</sup> The SAC defines Dive Computers as “Suunto-branded dive computers,  
27 including the Suunto Cobra, Suunto Cobra 2, Suunto Cobra 3, Suunto Cobra 3 Black,  
28 Suunto Vyper, Suunto Vyper 2, Suunto Vyper Air, Suunto HelO2, Suunto Gekko,  
Suunto Vyttec, Suunto Vyttec DS, Suunto D9tx, Suunto D9, Suunto D6, Suunto D6i,  
Suunto D4i, Suunto D4, Suunto Zoop, and Suunto Mosquito.” (ECF No. 117 at ¶ 1).

1 “providing information about the key features and specifications of Dive Computers,  
2 pictures of Dive Computers and videos on how the Dive Computers are used.” *Id.* ¶ 33.  
3 “Aqua Lung marketed the Dive Computers using marketing materials Suunto created  
4 and supplied to Aqua Lung for the purpose of marketing and selling the Dive  
5 Computers to United States consumers. . . . All advertising in the United States,  
6 including the product packaging for the Dive Computers, was and is created by and  
7 controlled by Suunto.” *Id.* ¶ 36.

8 “[T]he Dive Computers are defective and prone to malfunction, resulting in the  
9 Dive Computers providing inaccurate information regarding data such as dive depth,  
10 dive time, tank air pressure, and remaining air time.” *Id.* ¶ 41. “Defendants knew the  
11 Dive Computers were failing and defective and knew or should have known that the  
12 failing and defective Dive Computers created a life threatening risk of harm to  
13 consumers.” *Id.* ¶ 42.

14 Suunto maintains a world-wide web-based system for reporting issues  
15 with the Dive Computers. Every time an authorized repair facility,  
16 including Aqua Lung, repaired or repairs a Dive Computer, the  
17 information for the repair is entered in a computerized system known as  
the ‘Service Log’ that sends the information directly to Suunto in Finland.  
Repair facilities obtain replacement Dive Computers and replacement  
parts from Suunto based on the information input into the Service Log.

18 *Id.* ¶ 45. “Defendants received Dive Computers for repair from consumers who  
19 experienced permanent malfunction of the dive computer due to the defective software  
20 and/or hardware. This information was input into the Service Log and provided directly  
21 to Suunto.” *Id.* ¶ 47. “When a permanent malfunction occurs, the Dive Computers  
22 report incorrect depths, ‘self-dive’ or indicate that a dive is occurring when no dive is  
23 in fact occurring, report incorrect air time remaining, and/or report incorrect tank  
24 pressure. All of these malfunctions are the result of defective software and/or hardware  
25 in the Dive Computers.” *Id.* ¶ 48. Aqua Lung received thousands of Dive Computers  
26 suffering from the malfunction, “reported these failures to Suunto and had extensive  
27 communications with Suunto about the failures and need to fix the Dive Computers.”  
28 *Id.* ¶ 49.

1 “Suunto continued to manufacture Dive Computers for sale in the United States  
2 with the same defective software and/or hardware.” *Id.* ¶ 54. “When Aqua Lung and  
3 other repair facilities receive a Dive Computer that has suffered a permanent  
4 malfunction as described above, the repair facilities do not conduct any repairs . . .  
5 because . . . the defective software and/or hardware it is unrepairable.” *Id.* ¶ 55. “If the  
6 Dive Computer is outside warranty, the customer is told there is no repair.” *Id.* ¶ 56.  
7 “If the Dive Computer is within the product warranty, the defective Dive Computer is  
8 replaced with a new Dive Computer.” *Id.* ¶ 57. “[T]he replacement Dive Computers  
9 do not provide any relief because they suffer from the same hardware and/or software  
10 defect.” *Id.* ¶ 58. “Each of the Dive Computers . . . contains materially the same  
11 software and hardware that operates the Dive Computer’s critical functions.” *Id.* ¶ 3.

12 “None of the warning on the product packaging or in other marketing informed  
13 . . . consumers that because of the Dive Computers’ inherent defect . . . ordinary use of  
14 the Dive Computers carries a substantial risk of serious malfunction whereby the Dive  
15 Computer may quit working and/or provide incorrect information about a dive.” *Id.* ¶  
16 59. “Instead of properly warning consumers of the hazards posed by using the Dive  
17 Computers as intended, defendants continue to falsely represent that the Dive  
18 Computers will provide certain accurate information during a dive and impliedly that  
19 the Dive Computers are safe for use.” *Id.* “[D]efendants have never issued a recall of  
20 the Dive Computers or otherwise notified consumers that the Dive Computers contain  
21 [the] defect. . . .” *Id.* ¶ 53.

22 “Defendants advertised the Dive Computers as a safe product and failed to warn  
23 consumers that the Dive Computers are defective, and may malfunction and cause  
24 serious bodily harm or death during intended use. Plaintiffs and class members  
25 purchased and used the Dive Computers reasonably believing that the product was safe  
26 for its intended use.” *Id.* ¶ 61. “[P]laintiffs would not have purchased or used the Dive  
27 Computer had they known that the product was defective and could malfunction and  
28 cause serious bodily harm or death.” *Id.* ¶ 62. “Defendants’ omissions and

1 misrepresentations were a material factor in influencing plaintiffs’ decision to purchase  
2 the Dive Computers[.]” *Id.* ¶ 63.

3 On May 14, 2013, Plaintiff Huntzinger “purchased a Suunto Cobra 2 dive  
4 computer from leisurepro.com for \$699.95” that was “designed and manufactured by  
5 Suunto.” *Id.* ¶ 12. “Plaintiff Huntzinger purchased and used the Suunto Cobra 3 dive  
6 computer believing it was safe to use during scuba dives, when in fact the Suunto Cobra  
7 3 was defective, resulting in an inaccurate display of dive related information in 2014.”  
8 *Id.* “On or about 2009, plaintiff [Bush] purchased a Suunto Cobra 3 dive computer  
9 from Sport Chalet for approximately \$300 to \$400” that was “designed and  
10 manufactured by Suunto and distributed to Sport Chalet by Aqua Lung for the purpose  
11 of resale.” *Id.* ¶ 13. Plaintiff Bush purchased and used the Suunto Cobra 3 dive  
12 computer believing it was safe to use during scuba dives, when in fact the Suunto Cobra  
13 3 was defective[.]” *Id.* “On or about, October 2015, plaintiff Bush purchased a Suunto  
14 D6i to replace the unrepairable and defective Cobra 3. Plaintiff Bush purchased and  
15 used the Suunto D6i dive computer believing it was safe to use during scuba dives,  
16 when in fact the Suunto D6i was defective.” *Id.*

17 Plaintiffs “would not have purchased or used” the Dive Computers had they  
18 known that the Dive Computers were “unsafe and unfit for their intended use[.]” *Id.*  
19 ¶¶ 12,13. Plaintiffs Huntzinger and Bush “suffered injury in fact and lost money or  
20 property as a result of Suunto’s unfair business practice.” *Id.* ¶¶ 12,13.

21 Plaintiffs bring this action on behalf of themselves and all others similarly  
22 situated pursuant to Rule 23(a), (b)(2), and (b)(3) of the Federal Rules of  
23 Civil Procedure and seek certification of the following nationwide class:  
24 All persons and entities who purchased a Suunto Cobra, Suunto Cobra 2,  
25 Suunto Cobra 3, Suunto Cobra 3 Black, Suunto Vyper, Suunto Vyper 2,  
Suunto Vyper Air, Suunto HelO2, Suunto Gekko, Suunto Vytec, Suunto  
Vytec DS, Suunto D9tx, Suunto D9, Suunto D6, Suunto D6i, Suunto D4i,  
Suunto D4, Suunto Zoop, and [Suunto] Mosquito (collectively “Dive  
Computers”) in the United States for personal use (“Suunto Class”).

26 *Id.* ¶ 65. Plaintiff Bush also seeks certification of a nationwide subclass, “the Aqua  
27 Lung subclass,” of individuals that purchased in the United States and for personal use  
28 a Dive Computer distributed by Aqua Lung. *Id.* ¶ 66.

### 1 III. LEGAL STANDARDS

2 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move  
3 for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed.  
4 R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject  
5 matter jurisdiction over an action. *Assoc. of Med. Colleges v. United States*, 217 F.3d  
6 770, 778-779 (9th Cir. 2000). A jurisdictional attack pursuant to Rule 12(b)(1) may be  
7 facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). “In a facial attack,  
8 the challenger asserts that the allegations contained in the complaint are insufficient on  
9 their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger  
10 disputes the truth of the allegations that, by themselves, would otherwise invoke federal  
11 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In  
12 resolving a factual attack on jurisdiction, the district court may review evidence beyond  
13 the complaint without converting the motion to dismiss into a motion for summary  
14 judgment.” *Id.* (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2  
15 (9th Cir. 2003)).

16 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
17 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that  
18 states a claim for relief must contain . . . a short and plain statement of the claim  
19 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under  
20 Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or  
21 sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*  
22 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

23 To sufficiently state a claim for relief and survive a Rule 12(b)(6) motion, a  
24 complaint “does not need detailed factual allegations” but the “[f]actual allegations  
25 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*  
26 *Twombly*, 550 U.S. 544, 555 (2007). “[A] plaintiff’s obligation to provide the grounds  
27 of his entitlement to relief requires more than labels and conclusions, and a formulaic  
28 recitation of the elements of a cause of action will not do.” *Id.* When considering a

1 motion to dismiss, a court must accept as true all “well-pleaded factual allegations.”  
2 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is not “required to accept  
3 as true allegations that are merely conclusory, unwarranted deductions of fact, or  
4 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
5 Cir. 2001). “In sum, for a complaint to survive a motion to dismiss, the non-conclusory  
6 factual content, and reasonable inferences from that content, must be plausibly  
7 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572  
8 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

#### 9 **IV. MOTION TO DISMISS**

##### 10 **A. Standing**

11 Suunto contends that Plaintiffs lack standing because they have not sustained an  
12 injury-in-fact under Article III, the CLRA, or the UCL. (ECF No. 129-1 at 12-19).  
13 Suunto requests that the Court take judicial notice of discovery responses and discovery  
14 exchanged in this case pursuant to Federal Rule of Evidence 201. *Id.* at 13. Suunto  
15 contends that Plaintiff Huntzinger’s discovery responses contradict the allegations of  
16 the SAC and establish that he has not suffered any injury. *Id.* at 14. Specifically,  
17 Suunto contends that Plaintiff Huntzinger’s discovery response that he dove with the  
18 Cobra 3 after filing the complaint contradicts his allegations as to injury. *Id.* at 14-15,  
19 17. Suunto contends that Plaintiff Huntzinger’s “‘feeling’ that he can’t rely on his  
20 replacement Cobra 3 is nothing more than a ‘hypothetical’ injury that may happen if his  
21 device ever malfunctions” and is insufficient to establish Article III standing. *Id.* at 17.  
22 Suunto contends that Plaintiff Bush’s standing allegations are insufficient because he  
23 used the Cobra 3 “without incident, malfunction, or problem from 2009 to 2015” and  
24 that Bush purchased a D6i Dive Computer after the public filing of the instant lawsuit.  
25 *Id.* at 18. Suunto contends that the Cobra 3, D6i, and other Suunto Dive Computers are  
26 different models and the allegation in the SAC that the devices are “exactly the same”  
27 is false. *Id.* at 19.

28 Plaintiffs contend that the request for judicial notice should be denied because



1 discovery responses are not proper subjects of judicial notice on a motion to dismiss.  
2 (ECF No. 137 at 15). Plaintiffs contend that judicial notice is not appropriate because  
3 the discovery response at issue is in dispute. Plaintiffs assert that Huntzinger “disputes  
4 Suunto’s characterization of his discovery responses and their relevance to whether  
5 Huntzinger has standing.” *Id.* at 16. Further, Plaintiffs contend that Huntzinger’s  
6 discovery responses “further confirm his allegation that the replacement Dive Computer  
7 he received when his Cobra 3 malfunctioned is similarly defective and unsafe.” *Id.*  
8 Plaintiffs contend that the allegations of the SAC sufficiently allege Article III and  
9 statutory standing because Plaintiffs were injured by purchasing falsely advertised  
10 products. *Id.* at 17. Plaintiffs contend that their reliance on a material omission in  
11 deciding to purchase the Dive Computers is sufficient to confer standing. *Id.* at 19.  
12 Plaintiffs contend that the SAC sufficiently alleges that the different types of Dive  
13 Computers are similar. *Id.* at 21.

#### 14 **1. Request for Judicial Notice**

15 Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a  
16 fact that is not subject to reasonable dispute because it . . . is generally known within  
17 the trial court’s territorial jurisdiction; or . . . can be accurately and readily determined  
18 from sources whose accuracy cannot reasonably be questioned.” Fed R. Evid. 201(b).  
19 [U]nder Fed. R. Evid. 201, a court may take judicial notice of ‘matters of public  
20 record.’” *Lee*, 250 F.3d at 689 (quoting *Mack v. South Bay Beer Distrib.*, 798 F.2d  
21 1279, 1282 (9th Cir.1986)).

22 In this case, Suunto requests that the Court take judicial notice of Plaintiff’s  
23 Objections and Responses to Special Interrogatories and Plaintiff’s Objections and  
24 Responses to Request for Admissions (ECF No. 129-1 at 12-13; Exhibit 1 and 2, ECF  
25 No. 129-2) pursuant to Federal Rule of Evidence 201. Plaintiffs oppose this request and  
26 assert that Suunto mischaracterizes the discovery responses. The Court declines to take  
27 judicial notice of any discovery responses in this litigation because they are not the  
28 proper subject of judicial notice. *United Safeguard Distributors Ass’n, Inc. v.*

1 *Safeguard Bus. Sys., Inc.*, 145 F. Supp. 3d 932, 942 (C.D. Cal. 2015), reconsideration  
2 denied, No. 215CV03998RSWLAW, 2016 WL 2885848 (C.D. Cal. May 17, 2016)  
3 (“Discovery items such as requests for discovery and responses to requests for  
4 discovery are not proper subjects for judicial notice because they are not  
5 ‘self-authenticating’ and thus cannot be verified.”); *Brown v. Allstate Ins. Co.*, 17 F.  
6 Supp. 2d 1134, 1138 (S.D. Cal. 1998) (denying a request for judicial notice of two  
7 requests for admissions and stating “[t]he court proceeds with particular caution with  
8 respect to a request for judicial notice, when, as here, it is urged so to resolve a  
9 fundamental, dispositive factual dispute”). To the extent that Suunto requests judicial  
10 notice of Suunto’s Cobra 3 User Guide (ECF No. 129-2 at 2), that request is denied as  
11 unnecessary. *See, e.g., Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 n. 12 (9th Cir. 2009)  
12 (denying request for judicial notice where judicial notice would be “unnecessary”).

## 13 **2. Plaintiff’s Standing**

14 In the absence of Article III standing, a court lacks subject matter jurisdiction to  
15 entertain a lawsuit. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109-110  
16 (1998). Plaintiff must establish (1) an “injury in fact—an invasion of a legally  
17 protected interest which is (a) concrete and particularized . . . and (b) actual or  
18 imminent, not conjectural or hypothetical,” (2) “a causal connection between the injury  
19 and the conduct complained of,” and (3) a likelihood “that the injury will be redressed  
20 by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)  
21 (citations and internal quotation marks omitted).

22 The UCL prohibits any “unlawful, unfair, or fraudulent business act or practice.”  
23 Cal. Bus. & Prof. Code § 17200. A plaintiff alleging a UCL claim must satisfy UCL  
24 standing requirements. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 n.4 (9th Cir.  
25 2009). The UCL was revised in 2004 by Proposition 64, limiting private standing “to  
26 any ‘person who has suffered injury in fact or lost money or property as a result of  
27 unfair competition.’” *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 884 (Cal. 2011)  
28 (citing Bus. & Prof. Code, § 17204, as amended by Prop. 64, as approved by voters,

1 Gen. Elec. (Nov. 2, 2004) § 3).

2 “To establish standing to bring a claim under the UCL, the consumer must allege  
3 that (1) the defendant made a false representation about a product, (2) the consumer  
4 purchased the product in reliance on the misrepresentation, and (3) he would not have  
5 purchased the product otherwise.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1109 (9th  
6 Cir. 2013) (citing *Kwikset Corp.*, 246 P.3d at 877). Proposition 64 “imposes an actual  
7 reliance requirement on plaintiffs prosecuting a private enforcement action under the  
8 UCL’s fraud prong.” *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009).

9 The California Supreme Court has held that

10 Reliance is proved by showing that the defendant’s misrepresentation or  
11 nondisclosure was an immediate cause of the plaintiff’s injury-producing  
12 conduct. A plaintiff may establish that the defendant’s misrepresentation  
13 is an immediate cause of the plaintiff’s conduct by showing that in its  
14 absence the plaintiff in all reasonable probability would not have engaged  
15 in the injury-producing conduct. . . . It is enough that the representation  
16 has played a substantial part, and so had been a substantial factor, in  
17 influencing his decision.

18 *Id.* (citations and internal quotation marks omitted). “[A] presumption, or at least an  
19 inference, of reliance arises wherever there is a showing that a misrepresentation was  
20 material. A misrepresentation is judged to be ‘material’ if a reasonable man would  
21 attach importance to its existence or nonexistence in determining his choice of action  
22 in the transaction in question.” *Id.* (citations and internal quotation marks omitted).

23 A plaintiff who has standing under the UCL’s “lost money or property”  
24 requirement has also established standing under the CLRA. *Hinojos*, 718 F.3d at 1108  
25 (citing *Klein v. Chevron U.S.A., Inc.*, 137 Cal. Rptr. 3d 293, 320 (2012) (“noting that  
26 where a plaintiff alleged an economic injury under the UCL he also adequately alleged  
27 injury under the CLRA”)). “If a party has alleged or proven a personal, individualized  
28 loss of money or property in any nontrivial amount, he or she has also alleged or proven  
injury in fact.” *Kwikset Corp.*, 246 P.3d at 887.

In this case, Plaintiffs allege that they purchased Dive Computers but “would not  
have purchased or used” the Dive Computers had they known that the Dive Computers  
were “unsafe and unfit for their intended use[.]” (ECF No. 117 at ¶¶ 12,13). Plaintiffs

1 allege that “[n]one of the warnings on the product packaging or in other marketing  
2 informed . . . consumers that because of the Dive Computers’ inherent defect . .  
3 ordinary use of the Dive Computers carries a substantial risk of serious malfunction  
4 whereby the Dive Computer may quit working and/or provide incorrect information  
5 about a dive.” *Id.* ¶ 59. Plaintiffs allege that Suunto “continue[d] to falsely represent  
6 that the Dive Computers will provide certain accurate information during a dive and  
7 impliedly that the Dive Computers are safe for use.” *Id.* Plaintiffs allege that all Dive  
8 Computers, including replacements Dive Computers, are defective and cannot be safely  
9 used for their intended and advertised purpose. Plaintiffs allege that Suunto knew or  
10 should have known of the defects in the Dive Computers. Plaintiffs allege facts  
11 sufficient to infer that Suunto’s nondisclosure was a material fact in causing Plaintiffs  
12 to purchase Dive Computers. Plaintiffs’ allegations of a material nondisclosure are  
13 sufficient to infer that Plaintiffs relied on Suunto’s nondisclosure in deciding to  
14 purchase the Dive Computers. *See In re Tobacco II Cases*, 207 P.3d at 39. Plaintiffs  
15 allege sufficient facts to establish standing under Article III, the UCL and the CLRA at  
16 this stage in the proceedings.

### 17                   **3. Standing On Behalf of Dive Computers Not Purchased**

18           “In the Ninth Circuit, there is ‘no controlling authority’ on whether a plaintiff in  
19 a class action has standing to assert claims based on products he did not purchase.”  
20 *Morales v. Unilever U.S., Inc.*, Civ. No. 2:13-2213 WBS EFB, 2014 WL 1389613, at  
21 \*4 (E.D. Cal. Apr. 9, 2014) (quoting *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp.  
22 2d 861, 868 (N.D. Cal. 2012)); *see also Granfield v. NVIDIA Corp.*, No. C 11–05403  
23 JW, 2012 WL 2847575, at \*6 (N.D. Cal. July 11, 2012) (“[W]hen a plaintiff asserts  
24 claims based both on products that she purchased and products that she did not  
25 purchase, claims relating to products not purchased must be dismissed for lack of  
26 standing.”); *Allen v. Similason Corp.*, No. 12CV0376, 2013 WL 2120825, at \*4 (S.D.  
27 Cal. May 14, 2013) (“[W]hether a class representative may be allowed to present claims  
28 on behalf of others who have similar, but not identical, interests depends not on

1 standing, but on an assessment of typicality and adequacy of representation.”). “The  
2 majority of courts . . . hold that a plaintiff may have standing to assert claims for  
3 unnamed class members based on products he or she did not purchase as long as the  
4 products and alleged misrepresentation are substantially similar.” *Dorfman v.*  
5 *Nutramax Labs., Inc.*, No. 13-cv-873 WQH (RBB), 2013 WL 5353043, at \*6 (S.D. Cal.  
6 Sept. 23, 2013) (quoting *Brown v. Hain Celestial Group, Inc.*, 913 F. Supp. 2d 881, 890  
7 (N.D. Cal. 2012)). “In these . . . cases, the courts have found that analyzing the issue  
8 of standing when there are similarities between the products is better accomplished  
9 under Rule 23 at the time of class certification.” *Dabish v. Brand New Energy, LLC*,  
10 No. 16CV400 BAS (NLS), 2016 WL 7048319, at \*2 (S.D. Cal. Dec. 5, 2016); *see, e.g.*,  
11 *Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 992 (E.D. Cal. 2012).

12 In this case, Plaintiffs allege that each Dive Computer “contains materially the  
13 same software and hardware that operates the Dive Computer’s critical functions.”  
14 (ECF No. 117 at ¶ 3). Plaintiffs allege that this software and hardware “is defective  
15 because it can malfunction, causing the Dive Computers to provide inaccurate  
16 information about a dive.” *Id.* Plaintiffs allege that the defect “exists across all models  
17 of the Dive Computers.” *Id.* ¶ 7. Plaintiffs allege that this defect makes the Dive  
18 Computers unfit for the purpose they are designed, marketed, and sold for. Plaintiffs  
19 allege sufficient facts to support an inference that Suunto’s alleged practice of  
20 concealing the defects in the Dive Computers was uniform across all Dive Computers.  
21 *Id.* at ¶¶ 53-64. The Court concludes that Plaintiffs have alleged sufficient facts to  
22 avoid dismissal. Contentions regarding differences among the Dive Computers are best  
23 addressed at the class certification stage under Rule 23.

#### 24 **B. Failure to State a Claim: CLRA and UCL**

25 Suunto contends that Plaintiffs’ CLRA and UCL claims must be dismissed for  
26 failure to state a claim because Plaintiffs have failed to allege reliance on any  
27 misrepresentations or omissions by Suunto. (ECF No. 129-1 at 19). Suunto contends  
28 that Plaintiffs have failed to allege their claims with the specificity required by Rule

1 9(b) because the SAC fails to put Suunto on notice of the claims asserted by Plaintiffs.  
2 *Id.* at 21. Suunto contends that the SAC contains only “broad conclusory allegations  
3 of fraud” and fails to identify any misrepresentation relied on by Plaintiffs. *Id.* at 22.

4 Plaintiffs asserts that their “claims and corresponding allegations are not based  
5 on affirmative misrepresentations, but on Defendants’ failure to inform Plaintiffs of the  
6 safety defect in the Dive Computers.” (ECF No. 137 at 22). Plaintiffs contend that the  
7 SAC sufficiently alleges that Plaintiffs purchased Dive Computers as a result of  
8 Suunto’s omissions and that these omissions were a material factor in influencing their  
9 decision to purchase. *Id.* Plaintiffs contend that reliance can be presumed or inferred  
10 when the omission is material. *Id.* at 23. Plaintiffs contend that their UCL and CLRA  
11 claims are not grounded in fraud and thus the heightened pleading standard of Rule 9(b)  
12 is not applicable. *Id.* at 25. Plaintiffs contend that the allegations of the SAC are  
13 sufficient to satisfy Rule 9(b). *Id.* at 25.

14 Rule 9(b) of the Federal Rules of Civil Procedure states that “[i]n alleging fraud  
15 or mistake, a party must state with particularity the circumstances constituting fraud or  
16 mistake.” Fed. R. Civ. P. 9(b). “Averments of fraud must be accompanied by the who,  
17 what, when, where, and how of the misconduct charged.” *Vess v. Ciba-Geigy Corp.*  
18 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations and internal quotation marks  
19 omitted). “To comply with Rule 9(b), allegations of fraud must be specific enough to  
20 give defendants notice of the particular misconduct which is alleged to constitute the  
21 fraud charged so that they can defend against the charge and not just deny that they  
22 have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.  
23 2001) (citation and internal quotation marks omitted).

24 “[I]n a case where fraud is not an essential element of a claim, only allegations  
25 (‘averments’) of fraudulent conduct must satisfy the heightened pleading requirements  
26 of Rule 9(b). Allegations of non-fraudulent conduct need satisfy only the ordinary  
27 notice pleading standards of Rule 8(a).” *Vess*, 317 F.3d at 1104. “While fraud is not  
28 a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless

1 allege that defendant engaged in fraudulent conduct . . . . In that event, the claim is said  
2 to be grounded in fraud or to sound in fraud, and the pleading as a whole must satisfy  
3 the particularity requirement of Rule 9(b).” *Kearns v. Ford Motor Co.*, 567 F.3d 1120,  
4 1125 (9th Cir. 2009) (citations omitted). “Because the Supreme Court of California has  
5 held that nondisclosure is a claim for misrepresentation in a cause of action for fraud,  
6 it (as any other fraud claim) must be pleaded with particularity under Rule 9(b).” *Id.*  
7 at 1127.

8 A fraud-based omission claim under the UCL and CLRA “must be contrary to  
9 a representation actually made by the defendant, or an omission of fact the defendant  
10 was obliged to disclose.” *In re Sony Gaming Networks and Consumer Data Security*  
11 *Breach Litigation*, 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014). “A duty to disclose may  
12 arise: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when  
13 the defendant had exclusive knowledge of material facts not known to the plaintiff; (3)  
14 when the defendant actively conceals a material fact from the plaintiff; or (4) when the  
15 defendant makes partial representations but also suppresses some material fact.” *Id.*

16 In this case, the SAC alleges that Suunto controlled the product packaging and  
17 advertising of the Dive Computers sold in the United States and that the Dive  
18 Computers were “advertised as a safe product.” (ECF No. 117 ¶¶ 36-37, 61). The  
19 SAC alleges facts supporting an inference that representations about the Dive  
20 Computers were included in product packaging, Defendant Aqua Lung’s website, user  
21 guides created by Suunto, a website owned by Suunto, advertising and marketing  
22 materials created by Suunto, and in-store displays. *Id.* ¶¶ 31-40. Plaintiffs allege that  
23 Suunto knew “that the Dive Computers all contain the inherent defects, malfunction,  
24 and pose a significant hazard to consumers” based on numerous reports from Aqua  
25 Lung and a Service Log which documented all repairs done on Dive Computers by an  
26 authorized repair facility. *Id.* ¶¶ 52, 45-47, 49. Plaintiffs allege that Suunto did not  
27 disclose the defect or inform consumers that the defect could result in inaccurate  
28 information about dive depth, dive time, tank air pressure, and remaining air time. *Id.*

¶ 41. The factual allegations of the SAC are sufficient to support an inference that the Suunto knew of the defects in the Dive Computers and failed to disclose the material defect to consumers while continuing to market and distribute the Dive Computers as a safe product. Further Plaintiffs allege that they purchased Dive Computers “believing [they were] safe to use during scuba dives” and that they would not have purchased the products had they known that the Dive Computers were “unsafe and unfit for its intended use.” *Id.* ¶¶ 12-13. The Court has concluded that Plaintiffs allege sufficient facts to support an inference that Plaintiffs relied on Suunto’s material nondisclosure for purposes of its UCL and CLRA claims. *See supra* Part IV.A.2. The Court concludes that under the requirements of Rule 9(b), the Plaintiffs have plead sufficient facts to put Suunto on notice of the claims.

### **C. Failure to State a Claim: Breach of Implied Warranty**

Suunto contends that California law does not allow a breach of implied warranty claim against a manufacturer of products. Suunto contends that a plaintiff asserting breach of warranty claims must “stand in vertical contractual privity with defendant” and that there is no third-party beneficiary exception to the privity requirement. (ECF No. 129-1 at 23-24). Suunto further contends that even if the Court determines a third party beneficiary exception to the privity requirement exists, it cannot be extended to allow a consumer to sue a manufacturer “merely because he is an end user of the product.” *Id.* at 24.

Plaintiffs concede that Huntzinger “does not have an implied warranty claim against Suunto because he did not purchase his Dive Computer from an authorized retailer.” (ECF No. 137 at 26 n.2). However, Plaintiffs contend that Plaintiff Bush sufficiently alleges an implied warranty claim. Plaintiffs contend that there is a third-party beneficiary exception to the vertical privity requirement. Plaintiffs contend that Bush is a third-party beneficiary of “the implied warranty made between Suunto as the manufacturer and Aqua Lung as the distributor, and among Aqua Lung and the ultimate retail sellers where Bush and the other Class members purchased their Dive



1 Computers.” *Id.* at 29.

2 “Under California Commercial Code section 2314, ... a plaintiff asserting breach  
3 of warranty claims must stand in vertical contractual privity with the defendant.”  
4 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir.2008) (citation  
5 omitted). “A buyer and seller stand in privity if they are in adjoining links of the  
6 distribution chain.” *Id.* “Some particularized exceptions to the rule exist.” *Id.* In *Gilbert*  
7 *Fin. Corp. v. Steelform Contracting Co.*, 145 Cal. Rptr. 448 (Ct. App. 1978), a  
8 California appellate court determined that pursuant to California Civil Code section  
9 1559, the owner of a building could bring a breach of implied warranty claim as a third-  
10 party beneficiary to a contract between a contractor and a subcontractor, despite a lack  
11 of privity. *Id.* at 450 n.5. Relying on this decision, some district courts have  
12 determined that consumers can assert implied warranty claims, despite a lack of privity,  
13 as third party beneficiaries of agreements between the manufacturer and retailer. *See*,  
14 *e.g.*, *Roberts v. Electrolux Home Prod., Inc.*, No. CV 12-1644 CAS VBKX, 2013 WL  
15 7753579, at \*10 (C.D. Cal. Mar. 4, 2013) (“*Gilbert* is best interpreted to establish an  
16 exception to the privity requirement that applies when a plaintiff is the intended  
17 beneficiary of implied warranties in agreements linking a retailer and a manufacturer,  
18 and therefore a lack of privity does not bar plaintiff’s implied warranty claims.”); *In re*  
19 *MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 983 (N.D. Cal. 2014) (applying  
20 the third party beneficiary exception to plaintiffs who bought a car from a dealership  
21 and then sued the manufacturer for breach of implied warranty). *But see In re Seagate*  
22 *Tech. LLC Litig.*, 233 F. Supp. 3d 776, 787 (N.D. Cal. 2017) (“Although it appears that  
23 the majority of district court decisions to consider the question have held that a  
24 consumer who purchased a product from a retailer can invoke the third party  
25 beneficiary exception to bring an implied warranty claim against the manufacturer, this  
26 Court cannot square that outcome with *Clemens*.”).

27 “[W]here a plaintiff pleads that he or she is a third-party beneficiary to a contract  
28 that gives rise to the implied warranty of merchantability, he or she may assert a claim

1 for the implied warranty's breach." *In re Toyota Motor Corp. Unintended Acceleration*  
2 *Marketing, Sales Practices, and Products Liability Litigation*, 754 F. Supp. 2d 1145,  
3 1185 (C.D. Cal. 2010). "Under California Civil Code § 1559, a third party beneficiary  
4 can enforce a contract made expressly for his benefit . . . the only requirement is that  
5 the party is more than incidentally benefitted by the contract." *Cartwright v. Viking*  
6 *Industries, Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008). "Because third party beneficiary  
7 status is a matter of contract interpretation, a person seeking to enforce a contract as a  
8 third party beneficiary 'must plead a contract which was made expressly for his [or her]  
9 benefit and one in which it clearly appears that he [or she] was a beneficiary.' "  
10 *Schauer v. Mandarin Gems of California, Inc.*, 23 Cal. Rptr. 3d 233, 239 (Ct. App.  
11 2005 ) (quoting *California Emergency Physicians Medical Group v. PacifiCare of*  
12 *California*, 111 Cal. Rptr. 3d 583 (Ct. App. 2003)).

13 In this case, the SAC alleges that Plaintiff Bush purchased a Suunto Cobra 3 dive  
14 computer from Sport Chalet and later purchased a Suunto D6i dive computer "to  
15 replace the unrepairable and defective Cobra 3." (ECF No. 117 at ¶13). "Aqua Lung  
16 entered into distribution agreements with select retailers for the sole purpose of  
17 distributing the Dive Computers so that they could be sold from the retailers. As part  
18 of those distribution agreements, Aqua Lung impliedly warranted that the Dive  
19 Computers are reasonably safe, effective and adequately tested for their intended use  
20 and that they are of merchantable quality." (ECF No. 117 at ¶ 102). The SAC alleges,  
21 "Plaintiff Bush and members of the Aqua Lung Subclass, as purchasers of the Dive  
22 Computers, were the intended beneficiaries of the distribution agreements between  
23 Aqua Lung and retailers of the Dive Computers." *Id.* at ¶ 103. These factual  
24 allegations are specific to Defendant Aqua Lung's distribution agreements with  
25 retailers. With respect to Suunto, Plaintiff alleges that Suunto "entered into a  
26 distribution agreement with Aqua Lung for the purpose of marketing and distributing  
27 the Dive Computers in the United States for sale to consumers." *Id.* ¶ 21. Plaintiffs fail  
28 to allege sufficient facts to support a reasonable inference that Plaintiff Bush is an

1 intended third party beneficiary to any contract involving Suunto. The motion to  
2 dismiss the breach of implied warranty of merchantability claim as to Suunto is granted.

### 3 4 **V. MOTION TO STRIKE THIRD PARTY AMENDED COMPLAINT**

5 On July 5, 2017, Aqua Lung filed a document titled “Aqua Lung America, Inc.’s  
6 First Amended Third-Party Complaint Against Suunto Oy.” (ECF No. 124). Aqua  
7 Lung seeks to bring claims for equitable indemnity, comparative equitable indemnity,  
8 implied contractual indemnity, breach of implied warranty of merchantability, and  
9 declaratory relief against Suunto. (ECF No. 124).

10 Suunto filed a motion to strike the Amended Third Party Complaint on the  
11 grounds that “Suunto Oy is a defendant to the underlying and operative Second  
12 Amended Complaint filed by Plaintiffs, and any claim by Aqua Lung against Suunto  
13 Oy must be treated as a crossclaim rather than a third-party complaint.” (ECF No. 128  
14 at 2). Suunto requests that the Court strike the First Amended Third-Party Complaint  
15 with leave to Aqua Lung to file its crossclaims or in the alternative, “treat Aqua Lung’s  
16 third party pleading as a cross-claim and adjust the caption to reflect the proper status  
17 of all parties.” (ECF No. 128-1 at 5).

18 Aqua Lung filed a Notice of Non-opposition. (ECF No. 131). Aqua Lung states  
19 “Aqua Lung does not oppose Suunto’s request that the Court issue an order that the  
20 First Amended Third-Party Complaint be treated as a Cross-Complaint, and the docket  
21 be modified accordingly. However, in the event that the Court strikes the First  
22 Amended Third-Party Complaint and orders Aqua Lung to file a Cross-Complaint,  
23 Aqua Lung respectfully requests that the Court also order Suunto to file an answer to  
24 such Cross-Complaint within 14 days of service pursuant to Rule 15(a)(3).” (ECF No.  
25 131 at 4).

26 Pursuant to the agreement of Suunto and Aqua Lung, the motion to strike the  
27 First Amended Third-Party Complaint is granted and Aqua Lung is granted leave to  
28 refile the document as a cross-claim.

1 **VI. CONCLUSION**

2 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant  
3 Suunto is granted with respect to the breach of implied warranty of merchantability  
4 against Suunto and denied in all other respects. (ECF No. 129).

5 IT IS FURTHER ORDERED that the Motion to Strike the Third Party Amended  
6 Complaint is GRANTED. (ECF No. 128). The document filed as "First Amended  
7 Third-Party Complaint Against Suunto" (ECF No. 124) is stricken. The Court grants  
8 Aqua Lung leave to refile the document as a cross-claim within ten (10) days of the date  
9 this Order is issued.

10 DATED: January 8, 2018

11   
12 **WILLIAM Q. HAYES**  
13 United States District Judge  
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